

NA 07-0048-C H/H Wright v Astrue
Judge David F. Hamilton

Signed on 07/07/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

FRANCES A. WRIGHT,)	
)	
Plaintiff,)	
vs.)	NO. 4:07-cv-00048-DFH-WGH
)	
MICHAEL J. ASTRUE,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

FRANCES A. WRIGHT,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 4:07-cv-0048-DFH-WGH
)	
MICHAEL J. ASTRUE, Commissioner of)	
the Social Security Administration,)	
)	
Defendant.)	

ENTRY ON JUDICIAL REVIEW

Plaintiff Frances Wright seeks judicial review of a decision by the Commissioner of the Social Security Administration denying her application for disability insurance and supplemental security income. After a hearing, an ALJ determined on behalf of the Commissioner that Ms. Wright's fibromyalgia and tendinitis combined to form a severe impairment but that she still retained the capacity to perform light work with some limitations. Under the stringent standard for disability under the Social Security Act, the ALJ concluded that she was not entitled to benefits. On judicial review, Ms. Wright is proceeding without an attorney. She contends that this court should consider additional evidence that she did not present to the ALJ, that the ALJ's demeanor at her hearing violated her right to due process of law, and that the ALJ did not support his denial of benefits with substantial evidence. As explained below, the court affirms

the ALJ's decision. It is supported by substantial evidence. The ALJ did not deny Ms. Wright due process of law. Because this is a judicial review of an administrative decision and the court is not the original decision-maker here, the court may not consider Ms. Wright's new evidence.

Background

Ms. Wright was born in 1954 and worked for more than thirty years at various jobs, including assembling motors at a General Electric plant, teaching at a daycare center, substitute teaching at a high school, working as a certified nursing assistant, and helping her husband on their farm. She was apparently an active member of her community in earlier years, see Resp. Ex. J (collection of newspaper clippings and awards), but she began experiencing some health problems in 1999.

Ms. Wright complained to her primary physician, Dr. Michael Conway, about chest discomfort in July 1999. R. 284. On August 31, 1999, a stress test revealed normal cardiac activity. R. 235. Unsatisfied with this finding, Ms. Wright visited her sister's doctor, Dr. Bruce Gelinas, on October 11, 1999. R. 215-18. Dr. Gelinas wrote to Dr. Conway explaining that Ms. Wright's sister had not presented any symptoms indicating heart disease, but a catheterization had revealed evidence of multi-vessel disease. Ms. Wright had complained to Dr. Gelinas of frequent and unusual episodes of weakness, a feeling that her heart

was “flip flopping,” and pains in her neck, jaw, ears, and left arm. Dr. Gelinas monitored Ms. Wright’s heart beat for twenty-four hours, finding that her rhythm was normal overall but that she had a very rare ventricular ectopic beat. R. 303. He suggested to Dr. Conway that a catheterization might be helpful. R. 217. Dr. Ronald Land in performed a catheterization on October 28, 1999, which indicated that heart disease was not causing Ms. Wright’s chest pains. R. 213-14, 219.

In early 2001, Dr. Susan Meyer and Dr. James Whitler noted that Ms. Wright had an ovarian cyst and thickening of both her right ovary and her uterus. R. 233, 288-89. On February 1, 2001, Dr. Jeffrey Schulz removed her uterus, both ovaries, and her appendix. R. 230-31. Ms. Wright had some minor post-operation complications and began experiencing depression. She had suicidal thoughts at times, panicked if left alone for lengthy periods of time, and had “crying spells.” R. 273, 275-76. Although Dr. Conway diagnosed Ms. Wright with depression and prescribed her antidepressants, he never recommended or prescribed psychotherapy or any other non-medicinal treatment.

In 2002, Ms. Wright began complaining of swelling and pain in her legs and ankles. She went to the emergency room on August 15, 2002, where doctors found a blood clot and ordered her to stay off her feet all day. R. 274. When she saw Dr. Conway the next day, he prescribed special stockings to help reduce the swelling and recommended ankle and calf stretches. *Id.* During this time, Dr.

Conway and a radiologist, Dr. Neil Staib, also noted that Ms. Wright's thyroid levels were high. R. 229, 274.

Over the next year, Ms. Wright repeatedly complained to Dr. Conway about pain, exhaustion, dizziness, nausea, and disorientation. R. 103-08. She also complained of indigestion and a burning sensation in her throat. R. 107. In late 2003 and early 2004, Ms. Wright reported that she was not able to eat three meals a day and often ate Twinkies for breakfast. R. 108-09. Dr. Conway stressed the importance of a nutritious diet and recommended substituting "small amounts of nutritious food, for twinkies." R. 109. Dr. Conway also stressed the importance of decreasing laxative use. R. 108. In March 2004, Dr. Conway diagnosed Ms. Wright's pains and tenderness as fibromyalgia. R. 109. He discussed the condition with her and prescribed a muscle relaxant. *Id.*

In August 2004, Dr. Conway diagnosed osteoporosis in her hip. R. 222. On October 5, 2004, he explained the differences between fibromyalgia and arthritis. R. 113. He also advised that excessive resting would aggravate her depression. *Id.* After Ms. Wright continued to complain of chronic pain, Dr. Conway recommended several non-medicinal fibromyalgia treatments, including massages, light stretching, soaking in hot water, acupuncture, and seeing a rheumatologist. R. 259. On January 13, 2005, Ms. Wright saw Dr. Steven Windley, who did some acupuncture work around the abdominal scars left after her surgeries. R. 134-35. He recommended that Ms. Wright take multivitamins, fish oils, and an

antioxidant, and practice yoga. R. 135. He also prescribed a thyroid hormone replacement drug. In late 2004, Ms. Wright stopped working. In early 2005, she reported that her pain and exhaustion prevented or made very difficult her daily grooming and household activities. R. 77-80. She stopped going to her granddaughter's basketball games, shopping, and church. R. 77.

On February 15, 2005, Dr. Rick Silen, a psychologist, met with and evaluated Ms. Wright's mental and emotional states. R. 136-38. He found that she was depressed due to fibromyalgia. He described her Global Assessment of Functioning level as "hard to pinpoint. . . . She'd be great without the fibromyalgia, otherwise she's very low." R. 138.

In February and March 2005, state doctors reviewed Ms. Wright's medical file. Dr. Kenneth Neville, Ph.D., completed a Psychiatric Review Technique form on February 27, 2005. R. 142-55. He found that Ms. Wright had depression due to fibromyalgia but that this impairment was not severe and only mildly limited her ability to function. R. 152. In March 2005, Dr. S. Roush completed a Physical Residual Functional Capacity Assessment form based on Dr. Windley's evaluation on January 13, 2005 and found that she was "well balanced," seemed "to have good strength 5/5 throughout her arms and legs," was "very stiff in her upper trapezius" muscle, and had a normal gait despite some swelling in her legs. R. 135, 157. Dr. Roush determined that Ms. Wright could occasionally lift objects weighing up to twenty pounds; frequently lift objects weighing up to ten pounds;

sit, stand, and walk six hours per day; push and pull without limit; occasionally stoop, kneel, crouch, crawl, and climb ramps or stairs; and never climb ladders, ropes, or scaffolding. R. 157-58. She also could not reach in all directions with her left shoulder. R. 159.

In late 2005 and early 2006, Ms. Wright complained to Dr. Conway that her fibromyalgia continued to worsen. She reported increasing pain in her neck, legs, knees, hips, lower back, and arms. R. 253-54. Dr. Conway also diagnosed Ms. Wright as having irritable bowel syndrome. R. 254. He recommended that Ms. Wright increase her fiber intake and prescribed some digestive aids. R. 253-54. In February 2006, Dr. Jeffrey Schulz removed her gall bladder due to chronic inflammation and associated pain. R. 291. In June 2006, Ms. Wright reported that she was swelling twice her size. R. 93. In July 2006, she met with Mark Simmons, a physical therapist. He observed rotator cuff irritation and noted that Ms. Wright had a “very high pain rating with [a] high level of irritability at this point.” R. 196. He set several goals: to reduce her complaints of pain by fifty percent, to get Ms. Wright on an independent home exercise program, to bring her range of motion in her shoulders within normal limits, and to increase her muscle strength. R. 196-97. Given the level of her pain and related irritability, his expectations for success were “guarded.” R. 196.

In August 2006, Ms. Wright began seeing Dr. John Schuck and his nurse practitioner, Shelly Walsman. Ms. Wright had applied for and received Indiana

Medicaid benefits before switching doctors. R. 340-41, 349-50. Dr. Schuck diagnosed Ms. Wright with gastroesophageal reflux disease and fibromyalgia. R. 192. He noted that she had multiple trigger points and tender areas everywhere and sent her to a rheumatologist. *Id.*

On September 7, 2006, Ms. Wright saw Dr. Veronica Mesquida, a rheumatologist, about her fibromyalgia. Dr. Mesquida found that Ms. Wright was able to grip things well, had bony enlargements in her finger and thumbs joints, had bony enlargements in her big toes, had decreased ranges of motion in her left shoulder and right hip, had good general muscle strength, and was tender in sixteen out of the eighteen tender points. R. 166. Dr. Mequida diagnosed Ms. Wright as having fibromyalgia, depression, deconditioning, osteoarthritis, and left rotator cuff tendinitis. She also reported that Ms. Wright “brought up the subject of Social Security Disability. I explained to her that I am against disability in patients with fibromyalgia since they have a tendency to do worse after disability is given.” *Id.*

On September 19, 2006, Ms. Wright went to the emergency room at St. Vincent Jennings Hospital after collapsing. R. 183. She reported having sharp pain in her abdominal area and shortness of breath. R. 168. Dr. Median Ali suspected that Ms. Wright’s abdominal pain was caused by ulceration or inflammation. He scheduled Ms. Wright for an endoscopy and a cardiac stress test. Dr. Ali discharged Ms. Wright later that same day. The stress test came

back normal. R. 242-43. Dr. Pletcher performed the endoscopy on November 9, 2006. R. 240-41. The endoscopy revealed a “thumb-like extension” of cells in Ms. Wright’s esophagus known as Barrett’s esophagus. Dr. Pletcher also found that Ms. Wright had a hiatal hernia (where part of the stomach protrudes into the area above the diaphragm). He dilated her esophagus to help with her difficulties in swallowing and prescribed a laxative. On January 3, 2007, Dr. Pletcher also performed a colonoscopy, which revealed a normal colon but “several areas of increased fragility.” R. 238.

Ms. Wright filed a claim for disability insurance and supplemental income on December 30, 2004, and had an administrative hearing on October 19, 2006. At the hearing, a vocational expert testified that Ms. Wright could perform light work, including factory work. Based on Ms. Wright’s description of the heavy work she performed at the General Electric plant, the vocational expert stated that Ms. Wright could not return to that exact job but could do other factory work that constituted light work in both practice and name. On November 13, 2006, the ALJ denied Ms. Wright’s application for disability insurance and supplemental income. He found that while her fibromyalgia and left rotator cuff tendinitis combined to form a severe impairment, Ms. Wright was still capable of performing light work with modifications.

Statutory Framework for Determining Disability

To be eligible for disability insurance benefits or supplemental security income, Ms. Wright must establish that she suffers from a disability as defined by the Social Security Act (“Act”) in 42 U.S.C. §§ 423(d), 1382c(a)(3). Under the Act, a disability is an inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of no less than twelve months.

This standard is a stringent one. The Act does not contemplate degrees of disability or allow for an award based on partial disability. *Stephens v. Heckler*, 766 F.2d 284, 285 (7th Cir. 1985). The Act provides important assistance for some of the most disadvantaged members of American society. But before tax dollars are available for disability benefits, it must be clear that the claimant has an impairment severe enough to prevent her from performing virtually any kind of work. Under the statutory standard, these benefits are available as a matter of nearly last resort.

The implementing regulations for the Act provide the familiar five-step sequential evaluation of a disability claim. See 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The steps are:

- (1) Is the claimant currently employed? If so, she is not disabled.
- (2) If not, does the claimant have a severe impairment or combination of impairments? If not, she is not disabled.

- (3) If so, does the impairment meet or equal an impairment listed in Appendix 1 to Subpart P of Part 404 of 20 C.F.R.? If so, the claimant is disabled.
- (4) If not, does the claimant retain the residual functional capacity to perform her past relevant work? If so, she is not disabled.
- (5) If not, according to the claimant's residual functional capacity, age, education, and work experience, can the claimant make an adjustment to other work? If so, she is not disabled. If not, she is disabled.

When applying this test, the burden of proof rests on the claimant for the first four steps and on the Commissioner for the fifth step. *Zurawski v. Halter*, 245 F.3d 881, 886 (7th Cir. 2001).

Standard of Review

This court does not consider the evidence as if the court were the original hearing officer. On judicial review, if the Commissioner's decision is supported by substantial evidence, the court must uphold that decision even if the court might have decided the case differently in the first instance. See 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). To determine whether substantial evidence exists, the court reviews the record as a whole but does not attempt to substitute its judgment for the ALJ's judgment by reweighing the evidence, resolving material conflicts, or reconsidering facts or the credibility of witnesses. *Cannon v. Apfel*, 213 F.3d 970, 974 (7th Cir. 2000). "Where conflicting evidence allows reasonable minds to differ as to whether

a claimant is entitled to benefits,” the court must defer to the Commissioner’s resolution of that conflict. *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997).

A reversal and remand may be required, however, if the ALJ committed an error of law, *Nelson v. Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997), or if the ALJ based the decision on serious factual mistakes or omissions, *Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996). The ALJ has a basic obligation to develop a full and fair record, *Nelson*, 131 F.3d at 1235, and must build an accurate and logical bridge between the evidence and the result to afford the claimant meaningful judicial review of the administrative findings, *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). If the evidence on which the ALJ relied does not support the conclusion, the decision cannot be upheld. *Id.*

Ordinarily a credibility finding by an ALJ is binding on a reviewing court, unless that finding is based on errors of fact or logic. *Allord v. Barnhart*, 455 F.3d 818, 821 (7th Cir. 2006). In making a credibility determination, the ALJ must give specific reasons for the weight given to the claimant’s statements so that the claimant and subsequent reviewers will have a fair sense of how the claimant’s testimony was assessed. See *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003); *Steele v. Barnhart*, 290 F.3d 936, 941-42 (7th Cir. 2002); Social Security Ruling 96-7p, 61 Fed. Reg. 34,483, 34,486 (July 2, 1996). A remand is required when the ALJ makes credibility findings based on “serious errors in reasoning

rather than merely the demeanor of the witness.” *Carradine v. Barnhart*, 360 F.3d 751, 754 (7th Cir. 2004).

The ALJ’s Disability Determination

At the first step in the five-step process, the ALJ found that Ms. Wright was not and had not been employed since her alleged onset date of November 19, 2004. At the second step, the ALJ determined that Ms. Wright’s fibromyalgia and left rotator cuff tendinitis combined to cause a severe impairment. At the third step, the ALJ found that these impairments, individually or combined, did not meet or equal a listed impairment. At the fourth step, the ALJ determined that Ms. Wright could perform her former duties as an assembler in a factory as well as other light work. The ALJ included two sets of limits in his residual functional capacity determination: never lifting above shoulder level with her left arm and never using ladders, ropes, or scaffolds. Using vocational expert testimony, the ALJ determined that Ms. Wright could also work in the cleaning industry.

The ALJ concluded that Ms. Wright was not disabled for purposes of the Social Security Act. The Appeals Council denied Ms. Wright’s request for review, leaving the ALJ’s decision as the final decision of the Commissioner of Social Security. See *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000). Ms. Wright asks this court to review the denial. This court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3).

Discussion

I. Additional Evidence

In her appeal to the Appeals Council, Ms. Wright submitted medical reports generated after the ALJ's denial of benefits, as well as medical and non-medical evidence generated before the ALJ's denial of benefits, including: (1) Dr. Pletcher's endoscopy report on November 9, 2006, revealing a growth in Ms. Wright's esophagus and a hiatal hernia, R. 240-41; (2) Dr. Pletcher's colonoscopy report on January 3, 2007, revealing "several areas of increased fragility," R. 238; (3) Dr. Landin's and Dr. Staib's reports in 1999 ruling out heart disease as the source of her chest pain, R. 213-14, 235; (4) evidence related to the removal of her uterus, ovaries, and appendix in 2001, R. 230-31, 233, 288-89; (5) evidence of her August 15, 2002, trip to the emergency room because of a blood clot that caused swelling in her legs and ankles, R. 274; (6) Dr. Conway's diagnosis of osteoporosis in 2004 and his recommendations for holistic fibromyalgia treatments, R. 222, 259; (7) Dr. Conway's diagnosis in early 2006 of irritable bowel syndrome, R. 254; and (8) evidence related to the removal of her gall bladder in February 2006, R. 291.

Ms. Wright also submitted in her filings to this court a number of medical reports generated after both the ALJ's denial of benefits and the Appeals Council's decision not to review the ALJ's denial, including: (1) Dr. Frank Pistoia's observations on May 14, 2007, of mild degenerative changes and bilateral stenosis

in her lumbar spine, Compl. Ex. A; (2) Dr. Edward Bartley's diagnosis on May 14, 2007, of "moderately severe osteoporosis," Compl. Ex. B; (3) Jiffyrich Dechavez's observation during a physical therapy session on March 22, 2007, that Ms. Wright was strong enough to propel a wheelchair but would improve her ambulation more successfully with a rolling walker, Compl. Ex. C; and (4) Dr. Robert Buell's examination reports on April 9, 2007, and June 11, 2007, discussing Ms. Wright's chronic and diffuse pain, depression, gait disturbance, and possibly poor nutrition, Compl. Ex. E. Ms. Wright also submitted to this court the Indiana Family and Social Services Administration decision on May 31, 2006, to grant Medicaid benefits. Resp. Ex. F.

A reviewing court may order the Commissioner to look at additional evidence if the claimant can show that "there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g). The phrase "new evidence" in the sixth sentence of § 405(g) is slightly misleading because it does not mean evidence of new medical conditions or evidence of recent degeneration of existing conditions. See *Schmidt v. Barnhart*, 395 F.3d 737, 742-43 (7th Cir. 2005) (affirming ALJ's denial of benefits). Reviewing courts are limited strictly to evaluating evidence of a claimant's condition at the time the ALJ rendered the decision. The "new evidence" that section 405(g) refers to is evidence that was generated after the ALJ rendered a decision and that describes the claimant's condition prior to the ALJ's decision. *Id.* at 742.

Here, the appropriate way for Ms. Wright to submit evidence of medical conditions or recent degeneration found after the ALJ rendered his decision is to file a new application for benefits with the Social Security Administration, including both the old and the “new” relevant medical information. See *Kapusta v. Sullivan*, 900 F.2d 94, 97 (7th Cir. 1990) (affirming ALJ’s denial of benefits, and noting that if the claimant “has developed additional impairments since his first application for benefits, he may file a new application”); *Godsey v. Bowen*, 832 F.2d 443, 445 (7th Cir. 1987) (affirming ALJ’s denial of benefits, and observing that claimant could file new application for benefits based on recent degeneration of existing impairment). Based on her earnings record, she will be able to apply for disability insurance benefits based on any impairments she experiences before June 30, 2009. R. 54.

As for the evidence that Ms. Wright submitted to the Appeals Council that existed at the time of the ALJ’s decision, this court cannot rely on that evidence in evaluating the ALJ’s decision. This court’s role in reviewing denials of applications for Social Security benefits is to evaluate the merits of the ALJ’s decision based on the evidence before the ALJ (aside from the new evidence contemplated by the sixth sentence of § 405(g), discussed above). See *Eads v. Secretary of Dept. of Health and Human Services*, 983 F.2d 815, 818 (7th Cir. 1993) (affirming ALJ’s denial of benefits, and holding that “courts may not reverse an administrative law judge’s decision on the basis of evidence first submitted to the Appeals Council”). An ALJ may well determine that the additional evidence

describing Ms. Wright's osteoporosis, digestive impairments, blood clots, and numerous invasive surgeries when considered with her fibromyalgia and tendinitis demonstrates that Ms. Wright is disabled. But this court may not consider information that Ms. Wright did not submit to the ALJ even though it existed and apparently was readily available at the time the ALJ rendered his decision. Ms. Wright may file a new application for benefits and may include all of the relevant medical evidence she has or can obtain to support her application.

II. *Factual Disputes*

Along a similar line, Ms. Wright contests several pieces of evidence the ALJ relied on in denying her application. She claims that Dr. Conway and Dr. Mesquida could not have properly assessed her fibromyalgia because they never physically tested her tender points. She claims that Dr. Mesquida, not she, brought up the subject of disability during their consultation. She asserts that she did not return to Dr. Windley for further acupuncture sessions because she could not afford it and because he prescribed medication that conflicted with the advice of her primary physician, Dr. Conway.

Ms. Wright bases her challenges on assertions that she made for the first time in her complaint to this court. Even if her assertions are true – and this court is not the factfinder here – Ms. Wright did not present this information to the ALJ. The question is whether Ms. Wright has good cause under the sixth

sentence of § 405(g) for first explaining now why she saw Dr. Windley only once or for only now contesting Dr. Conway's and Dr. Mesquida's substantive evaluations.

Ms. Wright might have deserved more leniency under the good cause standard if she had presented her application for benefits to the ALJ *pro se*, as she is proceeding in this court. Because she was represented at that stage, however, she had ample opportunity to put forth her best case. See *Glenn v. Secretary of Health and Human Services*, 814 F.2d 387, 391 (7th Cir. 1987) (“When an applicant for social security benefits is represented by counsel the administrative law judge is entitled to assume that the applicant is making his strongest case for benefits.”). Ms. Wright clearly had access to the information contained in her assertions during her hearing and overall presentation of evidence to the ALJ; she was present for every contested exam, and she decided to see Dr. Windley only once. The challenges Ms. Wright presents here might have substantially undermined the ALJ's credibility determination and his assessment of the objective medical evidence in front of him. But the ALJ cannot make decisions based on information that is never presented to him. Ms. Wright had a duty to raise these points before the ALJ. In reviewing the ALJ's decision, this court cannot consider “new” evidence that Ms. Wright could have presented to the ALJ. See *Eads*, 983 F.2d at 818; *Kapusta*, 900 F.2d at 97.

III. *Due Process*

Ms. Wright also argues that the ALJ denied her due process of law at her administrative hearing by speaking and proceeding too quickly and by being “cruel and hateful” to her and to her attorney. This claim is groundless. First, there is no evidence at all that the ALJ acted with cruelty or hatred to anyone at any time. He mistakenly identified Ms. Wright’s attorney, but that error was harmless and unintentional. Ms. Wright’s attorney of record was Bradley Cage. R. 360. Herbert Webster, one of Cage’s colleagues, represented Ms. Wright at the hearing. R. 360-61. Webster could have corrected the ALJ when he introduced Ms. Wright’s attorney as Bradley Cage for the record at the beginning of the hearing, but did not do so. R. 336. Instead, about two-thirds of the way into the hearing, Webster brought the mistake to the ALJ’s attention. R. 360-61. That error certainly did not deny Ms. Wright due process of law.

Second, the record indicates that the ALJ gave Ms. Wright and her attorney ample opportunity to present evidence. Specifically, Ms. Wright claims that the ALJ did not give her attorney a fair chance to present an opening statement. The transcript demonstrates that the ALJ gave Ms. Wright and her attorney a chance to make an opening statement:

ALJ: And the opening statement.

Atty: Do I have any opening statement? (Inaudible) the statement I want to make is I know you have an expert here today on availability of employment and I think what I really want to strive today is [to] try to convince this Miss Daoud here – is it Miss or Mrs.?

VE: Miss.

Atty: Miss Daoud that they're jobs out there but I don't think, if anyone would spend a few minutes with Mrs. Wright, I don't think –

ALJ: Well, you'd have to – you're not suppose[d] to convince her, you're suppose[d] to convince me.

Atty: Yeah. Well, yes. But I think that she goes a lot on – you go a lot on her recommendation.

ALJ: Right.

Atty: And what I would like her to – what I'm going to try to get over to you folks today, even though they're jobs out there, and I know they're a lot of jobs out there and available, that if anybody would interview her or even give her a job that she wouldn't last 48 hours. So, that's where I'm going to try to convince this Court and (inaudible) –

ALJ: Okay.

Atty: – today.

ALJ: Okay. Thank you.

R. 339-40. The attorney apparently did not make a particularly effective opening statement, but that is not a denial of due process of law.

Third, the ALJ responded to Ms. Wright's requests for him to slow down and was courteous throughout the hearing. R. 337-38. He asked follow-up questions and prodded Ms. Wright to be specific in her complaints. R. 348-60. Ms. Wright was apparently upset throughout the hearing and cried several times. R. 20. Ms. Wright may have felt subjectively that the ALJ was treating her unfairly, but there is no objective evidence substantiating her due process claim.

IV. *Substantial Evidence*

Finally, Ms. Wright challenges the sufficiency of the evidence supporting the ALJ's denial of benefits. In 2004, Dr. Conway had reported that she had pains in multiple areas but had a good range of motion. R. 109. In 2005, Dr. Windley reported that her reaction to touching was normal, that she seemed well balanced, that she had good strength throughout her arms and legs, that her gait was normal, but that her shoulders were stiff and her legs slightly swollen. R. 135. In July and August 2006, Dr. Schuck reported that Ms. Wright had multiple tender points and decreased range of motion in her left arm. R. 192, 195. In July 2006, Mark Simmons, a physical therapist, noted that Ms. Wright had a limited active range of motion, limited strength, and pain that increased with activity. R. 196. In September 2006, Dr. Mesquida reported that Ms. Wright had good grip strength; good muscle strength; good range of motion in her back; decreased range of motion in her left shoulder and right hip; bony enlargements in her fingers, toes, and knees; and tenderness in sixteen out of eighteen tender points. R. 166. In February 2005, Dr. Silen rated Ms. Wright's psychiatric functioning level as "very low." R. 138. In July 2006, Dr. Schuck noted that Ms. Wright's depression was controlled through medication. R. 195. The objective medical evidence available to the ALJ indicated that Ms. Wright had some limitations but was not totally disabled.

In March 2005, based on Dr. Windley's January 2005 evaluation of Ms. Wright, Dr. Roush completed a physical residual functional capacity form indicating that Ms. Wright could perform light work with restrictions on using her left shoulder and on climbing ladders, ropes, and scaffolds. R. 157-59. On February 27, 2005, Dr. Neville completed a psychiatric review form indicating that Ms. Wright's depression only mildly limited her ability to function. R. 152. Given this evidence, the ALJ determined on November 13, 2006, that her depression was not severe and that her fibromyalgia and tendinitis were not disabling. The ALJ found that Ms. Wright could perform a range of light work, including her past relevant work as a factory worker, provided that the factory work constituted light work in both name and practice.

As the Seventh Circuit observed in *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996), fibromyalgia is "a common, but elusive and mysterious, disease" with unknown causes and with symptoms that are "entirely subjective." Some people afflicted with fibromyalgia are disabled from working, but most are not. *Id.* at 307. As the *Sarchet* court explained, the severity of fibromyalgia is difficult to substantiate because of the "unavailability of objective clinical tests." *Id.* Because of the unavailability of objective clinical tests, the claimant's credibility and subjective assertions of pain are crucial to the ALJ's disability determination.

Here, the ALJ credited Ms. Wright's identification of her symptoms but felt that the medical reports discussed above did not support her description of the

“intensity, persistence and limiting effects of these symptoms.” R. 17. He discounted her subjective complaints about the extent of her pain for four reasons: (1) she had “an unimpressive earnings record”; (2) no treating source found her disabled; (3) no neutral party corroborated her complaints about the extent of her pain; and (4) Ms. Wright was still able to drive and perform light household chores. R. 19.

First, Ms. Wright contests the ALJ’s comment in evaluating her credibility that she “has an unimpressive earnings record.” R. 19. Ms. Wright has had several jobs over the course of her life, including teaching at a daycare center, substitute teaching at a high school, working as a certified nursing assistant, assembling motors at a General Electric plant, and helping her husband on their farm. None of these jobs were highly paid, but they are jobs and necessary ones. Between 1979 and 2004, she reported income every year but one (1983) and earned an average income of \$7,746 per year with a median income of \$8,186 (adjusted for inflation). R. 55. From 1978 to 1994, she was unmarried and during some or all of that period was a single mother. R. 51-52, 340.

More than thirty-six million Americans are impoverished for a variety of reasons, see U.S. Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: 2006*, at 11 (Aug. 2007), *available at* <http://www.census.gov/hhes/www/poverty/poverty06.html>, including low wages, see Arne Kalleberg, *Moving Out of Low Wage Jobs: Opportunities and Barriers:*

An Overview of Panel 3, 10 Emp. Rts. & Emp. Pol'y J. 81 (2006) ("work by itself has not been the solution to poverty. Perhaps surprisingly to some, most poor people live in families where someone is working The problem of poverty has thus become increasingly a problem of working poverty, or of the existence and persistence of low-wage jobs.") (footnote omitted). Unskilled, single mothers in particular are at an earnings disadvantage. See Martina Shea, U.S. Census Bureau, Dynamics of Economic Well-Being: Poverty, 1990-1992, at 3, 5 tbl.A (1995) ("Single-parent families generally have female householders, and persons in female householder families are much more likely to be poor than persons in married-couple families."). Ms. Wright's income history does not necessarily show an "unimpressive earnings record," but reflects the realities of the American labor market and social environment for many unskilled women with children, particularly single mothers. This comment by the ALJ does not by itself, however, undermine the validity of his decision.

The ALJ correctly observed that none of Ms. Wright's treating doctors found her disabled or reported severe limitations of her ability to function.¹ Each encouraged her to exercise to decrease her pain and to increase her range of motion. R. 114, 166, 192. Ms. Wright was also able to participate in cardiac stress tests without any problem. R. 127, 131. The medical records Ms. Wright

¹Ms. Wright submitted only to this court a one-sentence note from Dr. Conway indicating that he (at some time before November 28, 2005) believed Ms. Wright was disabled. See Reply Ex. F. As discussed above, the court must disregard this evidence because it is not "new" under the sixth sentence of section 405(g) and was not before the ALJ.

submitted to the Appeals Council and to this court might present a much stronger case of disabling pain, but as discussed above, this court is limited to reviewing the ALJ's decision in light of the evidence before him.

The ALJ also correctly noted that the record did not include any evidence from third parties verifying Ms. Wright's description of her incapacitation. In April 2005, Ms. Wright reported that she was no longer able to take care of herself at all due to her pain and weakness. R. 84. Her husband indicated the contrary. In October 2006, her husband testified that he did not trust her to be by herself for extensive periods of time or to leave town alone. R. 368-69. But he reported that she was able to do some of the household cooking and could get around town. *Id.* While not overwhelming, this evidence and the medical reports discussed above support the ALJ's decision to partially discount Ms. Wright's complaints. His denial was not based on serious errors in reasoning, and survives judicial review. See *Allord*, 455 F.3d at 821 (reversing and remanding denial of application where the ALJ "based his judgment call on a variety of considerations but three of them were mistaken"); *Shramek v. Apfel*, 226 F.3d 809 (7th Cir. 2000) (affirming denial of benefits where the ALJ mis-characterized the claimant's and her treating physician's testimony but those errors did not ultimately impact the outcome).

Conclusion

For the foregoing reasons, the court affirms the ALJ's decision. Final judgment shall be entered consistent with this entry.

So ordered.

Date: July 7, 2008

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

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